In The
Supreme Court Of The United States

No. 76-1053

GEORGE R. McCASLIN,
d/b/a THE TAX MAN,

Petitioner

vs.

H & R BLOCK, INC.,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CASES

STATUTES AND RULES

TREATISES AND TEXTS

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OPINIONS BELOW

The District Court issued two opinions. The first was a lengthy order and opinion of January 29, 1976, granting a preliminary injunction. This opinion is reproduced as Exhibit B to the petition. The final order and opinion of the District Court was issued on May 21, 1976, and is attached as Exhibit C to the petition. The opinion of the Court of Appeals for the Fifth Circuit (Exhibit A to the petition) is reported at 541 F.2d 1098.

QUESTIONS PRESENTED

1. Does the district court have discretion, upon finding that a lawsuit was instituted and a preliminary injunction obtained in good faith, without malice, and upon probable cause, to discharge the injunction bond and deny an action for

damages to the party that was preliminarily enjoined.

2. Whether this Court should grant a writ of certiorari to determine the circumstances under which an action for damages may be maintained against an injunction bond when the party who would prosecute such an action would not, in any event, be entitled to damages.

3. Whether this Court should grant a writ of certiorari to consider whether an action may be maintained on an injunction bond when the underlying issues of state law in a diversity case were improperly decided.

STATEMENT OF THE CASE

This appeal is the progeny of an action instituted by H & R Block to enforce a non-compete clause against a former city manager of the H & R Block business in Augusta, Georgia. The suit was filed on January 8, 1976 (A.1)[1], and on January 9, 1976, H & R Block moved for a temporary restraining order or in the alternative for a preliminary injunction (A.10). A hearing on the motion was held on January 9, 1976, and the district court ordered an evidentiary hearing for January 16, 1976 (A.36).

A full evidentiary hearing was held on January 16 (A.90-175) and both parties submitted proposed findings and conclusions to the court. On January 29, 1976, the trial court entered its order and opinion (A.67-75) granting a preliminary injunction prohibiting competition by the former manager (McCaslin) effective upon the filing of a bond by H & R Block. A $50,000 bond was filed on February 2, 1976, and the injunction went into effect (A.76).

[1]"A" references are to the printed appendix on appeal to the United States Court of Appeals for the Fifth Circuit.

On May 13, 1976, the matter came on for trial before the court with an advisory jury. (A.184). Notwithstanding the findings of the trial court in its initial order of January 29, 1976, the advisory jury answered special interrogatories in favor of allowing McCaslin to compete (A.184). In specific, the jury found that $10,000 was not in dispute, that Mr. McCaslin would not have done $10,000 damage to H & R Block over a five-year period, that Mr. McCaslin would have no competitive impact for a time up to five years, and that the non-compete clause was otherwise unreasonable (A.181.-182).

The district court accepted all the findings of the advisory jury except as to jurisdictional amount (A. 185-186), and entered an order and opinion in conformity therewith. In addition, the court found that H & R Block and its surety should be discharged on their bond as the case did not present sufficient circumstances for a damage action even though the preliminary injunction was dissolved (A. 183-188).

Following the entry of judgment on the trial court's order, McCaslin filed a notice of appeal asserting that it was error for the trial court to discharge H & R Block and its surety on the bond (A. 190). H & R Block cross-appealed contending that it was error for the court to deny a permanent injunction (A. 198).

On appeal, it was held by the Fifth Circuit that awarding of damages pursuant to an injunction bond is within the discretion of the district court and that the record sufficiently supported the decision of the district court in denying damages in this case. On the cross-appeal of H & R Block going to the merits of the covenant against competition, the court of appeals acknowledged that two aspects of the covenant fell within the permissible restrictions

of the Georgia cases. As to the third and final aspect of the covenant, the court of appeals reached no independent conclusion while acknowledging the difficulty encountered by the district court. The matter was resolved by the court of appeal's finding that the district court's decision was not clearly erroneous.

STATEMENT OF UNDISPUTED FACTS

H & R Block is a nationally known company involved in the preparation of income tax returns. H & R Block has been in business since 1954 and has 7,000 offices across the country (A. 345-346). It has seven locations in Augusta and some 60 employees, all of which are under the direction and control of a city manager (A. 143).

Mr. McCaslin was the Augusta manager for H & R Block for ten years until his employment was terminated at the end of 1975 (A. 202). Prior to coming to Augusta, he was an income tax preparer for H & R Block. Mr. McCaslin has worked most of his adult life for H & R Block (A. 203-04) and "most of his experience has been with H & R Block (A. 234)." While city manager in Augusta, Mr. McCaslin signed a contract with H & R Block in 1967 that contained the following covenant against competition (A. 204):

> 8. **Covenant Against Competition.** Employee agrees that at no time will he reveal, directly or indirectly, any confidential business information of the Company without written authorization from the Company. Employee further agrees that during the continuance of this Agreement and for a period of 5 years thereafter he will not, directly or indirectly, (whether as owner, employee, agent, stockholder or in any other capacity) solicit, accept or in any way establish or engage in any business for the preparation of tax returns situated or soliciting business within an area of twenty-five (25) miles of the Branch Office without the written permission of the Company. Recognizing that because of his access to confidential business information and his substantial training and experience with the Company, irreparable injury to the Company would be caused by his violation of any provision of this paragraph, employee agrees that in addition to and without limitation of any right the Company may have hereunder, any such violation shall be the proper subject matter for immediate injunctive relief. (A. 412).

Beginning in early 1975, Mr. McCaslin became aware that H & R Block was requiring its city managers to sign a contract with a different compensation formula than had been used in previous years (A. 312). At that time Mr. McCaslin began discussing with other H & R Block employees that he might open his own tax preparation business (A. 100). Finally in August, Mr. McCaslin refused to work under the new contract and he was terminated (A. 312).[2]

On January 4, 1976, Mr. McCaslin opened his own tax preparation business in Augusta (A. 314). Mr. McCaslin admits that this business was in direct competition with H & R Block and in violation of the terms of the non-compete clause (A. 204). He neither received nor requested permission, written or oral, from H & R Block to engage in such competition (A. 249-50).

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[2]The dispute detween H & R Block and Mr. McCaslin was over compensation. The Augusta H & R Block operation would have had to increase its business from year to year for the manager to have earned as much as in the past (A. 121). However, the circumstances of termination have no bearing on the enforceability of non-compete clauses. *Ogle v. Wright*, 187 Ga. 749, 2 S.E.2d 73 (1939).

Not only did Mr. McCaslin start a competing business, he did so directly at the expense of his former employer. Mr. McCaslin set up four locations. One location was on the main business street in Augusta, **two-doors** down from the principal H & R Block office (A. 224, 140). Another location was in the same shopping center as a H & R Block office and McCaslin knew that the shopping center location he chose was better than that which H & R Block had (A. 140, 225-26). The other two locations were set up in discount department stores very close to other H & R Block offices (A. 140). Moreover, Mr. McCaslin based his use of department stores as office sites on his experience in using Sears and Roebuck stores in Augusta for H & R Block (A. 226).

Perhaps more damaging was the manner in which Mr. McCaslin staffed his offices. All nine employees hired by him were former H & R Block employees whose experience and ability were known to Mr. McCaslin because of his past employment with H & R Block (A. 216, 223-24). Seven had been working for H & R Block until hired by Mr. McCaslin (A. 216). One of these seven was an office manager for H & R Block (A. 216). Certain of these employees had worked for H & R Block in Augusta for as many as **three, four, seven** and **ten** years (A. 23).

These employees had produced approximately $50,000 or 22% of the gross income for H & R Block in Augusta in 1975 (A. 238 260). H & R Block expected that they would return for work in 1976 but they did not when they were hired by Mr. McCaslin (A. 305, 334). After these employees left H & R Block, they were often requested by customers who went elsewhere upon learning that these preparers were no longer employed (A. 334). H & R Block was able to retain some six other employees who were solicited by Mr. McCaslin (A. 218-19). H & R Block suffered substantial difficulty in staffing its offices when these employees departed (A. 333).

In the operation of his new business until the injunction went into effect, Mr. McCaslin followed a pattern of doing things just as he has been trained to do them while he was employed by H & R Block. When asked at the preliminary hearing, Mr. McCaslin stated that his business was substantially different only in the types of office equipment used (A. 110-11; also A. 229). Mr. McCaslin offered to compensate his new employees on a "30/10" basis, i.e., 30% of the fee plus an extra 10% for business solicited by the employees (A. 104-05). Mr. McCaslin made a point of telling them that the 10% extra would apply to former customers of H & R Block (A. 104).

In operating his business, Mr. McCaslin based his charges to customers and payments to employees on what H & R Block had done (A. 228). Mr. McCaslin advertised the fact that he had been in the business for ten years in the CSRA[3] (A. 230, 415). He advertised the identical guarantee that H & R Block uses (A. 230-31, 420). Mr. McCaslin admitted that he wanted to take away H & R Block customers (A. 222).

ARGUMENT

THE DISTRICT COURT HAS DISCRETION TO ALLOW OR DISALLOW AN ACTION FOR DAMAGES ON AN INJUNCTION BOND.

The benchmark decision in this area of the law is **Russell v. Farley,** 105 U.S. 433 (1881) where the Supreme Court held that an action on an injunction bond is discretionary with the trial court.

Since the discretion of imposing terms upon a party, as a condition of granting or withhold-

[3]"Central Savannah River Area", i.e., Augusta.

ing an injunction, is an inherit power of the court, exercised for the purpose of effecting justice between the parties, it would seem to follow that, in the absence of an imperative statute to the contrary, the court should have the power to mitigate the terms imposed, or to relieve from them altogether . . . . Besides, the power to impose a condition implies the power to relieve from it. . . .

On general principles, the same reason applies where. . . a party is required to give bond to answer the damage which the adverse party may sustain by the action of the court. In the course of the cause, or at the final hearing, it may manifestly appear that such an extraordinary security ought not to be retained as the basis of further litigation between the parties; that the suit has been fairly and honestly pursued or defended by the party who was required to enter into the undertaking, and that it would be inequitable to subject him to any other liability than that which the law imposes in ordinary cases. . . .

That damages were sustained is very probable. Such a litigation as this would hardly fail to result in damage to all the parties engaged in it . . . . The question before the court or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered....On this point, the judgment of the court approaches so near to an exercise of discretion, that we should require a very clear case to be made in order to induce us to reverse it. 26 L.Ed. 1063-65.

Some years later, in a case not altogether different in principle from that presently before the Court, the issue arose in **Greenwood County v. Duke Power Company,** 107 F.2d 484 (4 Cir. 1939), **cert. denied,** 309 U.S. 667 (1940). In that case a commercial power company obtained a preliminary injunction which halted the receipt of funds by a county government from the U.S. Public Works Administration which funds would have been used to construct a power plant. The injunction stayed in effect for some three years before it was finally determined, after several hearings and appeals, that the power company would not prevail. Thereupon, the county government brought suit on the injunction bond attempting to recover the amount of profits which it alleged would have been earned had the power plant been constructed.

The district court dismissed the suit by the county government and the dismissal was affirmed by the Fourth Circuit. In its opinion, the Fourth Circuit emphasized that there was no allegation that the power company had acted "maliciously or without probable cause." In its affirming opinion, the court included the following:

> It must be remembered, in this connection, that the awarding of damages under such a bond is not a matter of right, but one resting in the sound discretion of the court. (citation to **Russell v. Farley**) . . . The position of plaintiff was taken in good faith on the question of law as to which there was a wide divergence of opinion. There was no unnecessary delay, but on the contrary the case was expedited and heard as rapidly as possible. 107 F.2d at 489.

In arguing that the district court erred in discharging Block and its surety, petitioner is in effect asking for a **per se** rule; that is, if the injunction is dissolved, the party who was enjoined automatically has an action for its damages. However, the cases cited by petitioner are not viable authority

in support of this position and only **Atomic Oil Co. v. Bardahl Oil Co.,** 419 F.2d 1097 (10 Cir. 1969) attempts to distinguish the rule of **Russell v. Farley.** In **Atomic Oil,** the Tenth Circuit states that **Russell v. Farley** may be distinguished because the opinion pre-dated the enactment of Rule 65 (c), FRCP. Reference is made to the fact that the conclusion in **Russell v. Farley** is preceded with an acknowledgement by the Court that "no Act of Congress, or rule of this Court, has ever been passed or adopted on this subject." 26 L.Ed. at 1063. Yet after making this comparison, the Tenth Circuit did not go so far as to announce a contrary rule. It based its decision to allow an action on the injunction bond on the fact that the trial court had "taken no action with respect to the liability established by the bond." This is to be contrasted with the situation in **Russell v. Farley,** and in the present case, where both courts found that the litigation had been pursued "fairly and honestly" and that the circumstances did not demand any liability other than that "which the law imposes in ordinary cases." 26 L.Ed. at 1063.[4]

The most careful attention given to the present issue since the enactment of the Federal Rules of Civil Procedure is in **Page Communications Engineers, Inc. V. Froelke,** 475 F.2d 994 (D.C. Cir. 1973). In this case an unsuccessful bidder on a Department of Defense contract obtained a preliminary injunction which prevented for a time the awarding of the contract. When the injunction was later dissolved, the government counterclaimed for damages on the injunction bond which had been posted by the plaintiff.

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[4]The other case cited by petitioner in support of its position is *Northeast Airlines, Inc. v. Nationwide Charters and Conventions, Inc.,* 413 F.2d 335 (1 Cir. 69) which simply does not discuss the power of the district court to either allow or disallow a suit on an injunction bond.

The district court dismissed the counterclaim by the government and the Court of Appeals affirmed. Both courts found that plaintiff's action was "not frivolous" and that it presented "solid questions". The Court of Appeals then stated the following analysis of bond recoveries vis-a-vis Rule 65 (c):

> Although Rule 65 (c) required a bond here, it does not follow that the district court was bound to award damages on the bond, without considering the equities of the case. The Rule did not make judgment on the bond automatic, upon a showing of damage. On the contrary, the court in considering the matter of damages was exercising its equity powers, and was bound to effect justice between the parties, avoiding any result that would be inequitable or oppressive for either party. The Rule was not intended to negate the court's duty in this regard. Thus, we hold that the court had discretion to refuse to award damages, in the interest of equity and justice. This conclusion is consistant with the provision of the Rule which gives the court discretion to fix bond in a nominal amount; clearly the rule does not contemplate that a defendant who is wrongfully enjoined will always be made whole by recovery of damages. 475 F.2d at 997.[5]

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[5]Additional weight for the proposition that the enactment of Rule 65 (c) did not change the rule of "discretion" is found in the Rules Committee Note of 1946 reprinted at 7 *Moore's,* §65.01[8]. In the note the committee acknowledged the holding of *Russell V. Farley* but did not indicate in any way that the import of this case was changed by Rule 65 (c). The committee simply wanted to make clear that an action on the bond, if appropriate, could be brought in the same proceeding as the original action.

In the event that this Court is inclined to re-evaluate the present law on the trial court's "discretion" to decide whether an action may be maintained on an injunction bond, any such reexamination would not redound to be benefit of the present petitioner. While the enactment of Rule 65 (c) might arguably be a basis for limiting discretion, it is clearly established that an action on an appeal bond will not lie under circumstances such as those extant in the present case. This is plainly stated in Professor Moore's treatise:

> It is well settled that there is no liability for damages resulting from suit for an injunction or from a restraining order or injunction erroneously granted, unless the suit was prosecuted maliciously and without probable cause....[6]

The reason for such a rule is well stated in **United Motors Service v. Tropic-Aire,** 57 F.2d 479, 483 (8 Cir. 1932).

> The philosophy of the matter is that an error in granting an injunction is an error of the court, for which there is no recovery in damages unless the same is sufficiently intentional as to be the basis for a suit for malicious prosecution, otherwise the damage is **damnum absque injuria.**

Upon reflection, it would be peculiar if the rule were otherwise. On appeal, the district court's decision to grant or deny an injunction is reviewed under a standard of "discretion". **Doran v. Salem Inn, Inc.,** 422 U.S. 922, 932, 45 L.Ed.2d 648 (1975). In addition, it has been held that the district court has discretion in the appropriate case to altogether forgo the requirement that security be posted. **Scherr v. Volpe,** 466 F.2d 1027, 1035 (7 Cir. 1972);

[6] *7 Moore's Federal Practice,* §65.10[1], p. 65-98

Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782, (10 Cir. 1964). Under such circumstances, unless the reviewing court is willing to conclude that the grant of an injunction was an abuse of a discretion by the district court and that the party who sought the injunction contributed in some wrongful way to its issuance, liability should not be created for the good faith use of a legal process in which the district court concurred.

Nowhere else in the law is there a situation where a party is exposed to a penalty for having honestly and forthrightly pursued a remedy afforded by law when there was probable cause to believe that the remedy should be granted. Assume, for example, that the injunction had been granted in the trial court as a part of a final order after a trial on the merits as opposed to a preliminary injunction after an evidentiary hearing. In the hypothetical situation where the injunction is imposed after a trial on the merits, there is no requirement that the prevailing party post bond even though the litigation may continue on appeal. To the contrary, it is the party that has been enjoined that must obtain a stay of the trial court's order. Rule 8, FRAP.

Thus, a bond is required when an injunction is obtained in a preliminary stage of the proceedings and is not required if the injunction is entered after a trial on the merits. The obvious reason for this distinction is that an injunction obtained at a preliminary proceeding runs the risk of having been procured without probable cause or a sound basis in fact and law. But when the district court thereafter hears the evidence at the trial on the merits, and compares it to what the plaintiff presented at the preliminary proceeding, the court can determine whether the plaintiff acted in good faith and with probable cause.

This view is consistent with the notion expressed in **Russell v. Farley** that the trial court should be able to leave the parties with the liabilities which they would face in "ordinary cases". 26 L.Ed. at 1063. Moreover, a literal reading of the word "wrongful" in Rule 65 (c), FRCP, would require the party enjoined to show more than that the injunction was subsequently lifted or its imposition reversed by higher courts. If the latter were intended, the Rule would have stated that the bond is security for damages sustained as a result of an injunction which is later dissolved or reversed. Instead, "wrongful" is the predicate used in the Rule and respondent submits that this term has a definite and substantive meaning.

Under the law of Georgia, there is no cause of action for another's wrongful use of a legal process, whether that process be in equity or in law, without a showing that the process was used or invoked with malice or without probable cause. **Georgia Loan & Trust Co. v. Johnson,** 116 Ga. 628 (1905); **Mitchell v. The Southwestern Railroad,** 75 Ga. 398 (1885); **Chamberlain Co. of America v. Mays,** 96 Ga. App. 755, 759, 101 S.E.2d 728 (1957); and **Spires v. Spires,** 30 Ga. App. 228, 229; 17 S.E. 255 (1923). If Rule 65 (c) was intended to mean that an action for damages will lie in every instance where an injunction is lifted or its imposition reversed, such a meaning could have been clearly expressed. As the Rule is now worded, "wrongful" must connotate something more than an honest, open, and well-founded attempt to obtain the benefits of a legal remedy.

THE DISTRICT COURT CORRECTLY EXERCISED ITS DISCRETION AND/OR FOUND THE PETITIONER TO HAVE ACTED WITH GOOD FAITH AND PROBABLE CAUSE.

It must be remembered that the preliminary

injunction was granted by the district court after an extensive evidentiary hearing on January 16, 1976. (A. 90-176). Also at that time the district court had the benefit of numerous affidavits and exhibits which had been submitted by the parties. (A. 27, 37, 43). After considering this evidence for nearly two weeks, the district court then issued a well-reasoned and detailed nine-page order upholding the validity of the covenant against competition and imposing a preliminary injunction against the former employee.

Some four months later, a trial on the merits was conducted with the same witnesses and the same evidence except that the defendant presented the opinion testimony of four additional witnesses who stated that in their opinion a five-year covenant against competition was not needed.[7] The matter was tried before an advisory jury which answered special verdict questions so as to allow competition by the former employee against his former corporate, employer. The trial court adopted the findings of the advisory jury (except as to jurisdiction) and in one paragraph reversed its view as to the validity of the covenant. (A. 186-187).[8]

H & R Block submits that there is no serious challenge to the validity of the findings by the trial

[7]The evidence remained without conflict, however, that the former employee would have the ability to compete to the disadvantage of Block even after five years. Respondent admitted as much. (A. 234).

[8]This Court may well be puzzled at this reversal by the district court. The explanation is that the only leverage which the trial judge could exert over the plaintiff for purposes of settlement after having granted the preliminary injunction was the prospect of having to re-try the issues of fact before a jury. When the case was not settled, the trial court conducted the jury trial and adopted the verdict of the advisory jury. The trial court tempered this about-face with its ruling that an action would not lie on the injunction bond.

court that H & R Block acted in good faith and on a reasonable expectation that it would prevail on the merits of the case. Nor is there any serious challenge by petitioner to the finding by the trial court that the case was pursued and disposed of "without undue delay and without concealment of pertinent facts needed for a determination of the cause." (A. 187). These findings by the trial court must be sustained under the clearly erroneous rule. **United States v. United States Gypsum Co.,** 333 U.S. 364, 394-395 (1948).

In view of these unchallenged findings of the district court, it must be deemed as conclusive for purposes of the present petition that H & R Block acted in good faith, with probable cause, and without undue delay. In addition, there is the very close question of whether H & R Block is entitled to prevail on the merits of the covenant not to compete.[9] There is also the unique factual background from which the present case arose. One party or the other was going to be disadvantaged for a time because of the trial court's ruling on the motion for a preliminary injunction; there was no middle ground. The risk of harm to the parties was no greater in enjoining Mr. McCaslin from competing than it would have been had the court allowed his competing business to continue **pendente lite** with an equally onerous disadvantage to the former employer. In such circumstances, when the law and facts appear to afford relief to the former employer, it seems much more reasonable to enjoin the business which has not yet become established than to run the greater risk of error in allowing an established enterprise to be damaged by unlawful competition.

In sum, there are numerous considerations which justify the actions of H & R Block and the

[9]A point that will be discussed in more detail in a succeeding section of this brief.

decision of the trial court. Whether this court considers an action on an injunction bond to be governed by "discretion" or by the absence or presence **vel non** of good faith, probable cause, etc., an action for damages would be inappropriate against H & R Block.

CERTIORARI IS INAPPROPRIATE IN ANY EVENT BECAUSE PETITIONER HAS NO SUSTAINABLE CLAIM FOR DAMAGES

In addition to the foregoing argument, there is another reason why the district court's decision was correct and why certiorari would be inappropriate here. Any damages which Mr. McCaslin might have asserted would have been too remote or speculative to be recovered under the Georgia law.

> As a general rule the expected profits of a commercial business are too uncertain, speculative, and remote, to permit a recovery for their loss. However, the loss of profits from the destruction or interruption of an **established** business may be recovered if the amount of actual loss is rendered reasonably certain by competent proof, but in all such cases it must be made to appear that the business which is claimed to have been interrupted was an established one, that it had been successfully conducted for such a length of time, and had such a trade established, that the profits thereof are reasonably ascertainable. **Atlanta Gas Light Company v. Newman,** 88 Ga. App. 252, 253, 76 S.E.2d 536 (1953). (Emphasis added).

In the present case, Mr. McCaslin's business was not established until January 4, 1976, and the business was shortly thereafter enjoined by the district court's order of January 29, 1976. Mr. McCaslin's enterprise had no history of profits or earnings (A. 313). While it was found by the trial

court that Mr. McCaslin's competition would damage H & R Block, (A. 186), three of Mr. McCaslin's own witnesses testified that there was no certainty that McCaslin would make a profit (A. 265, 275-76, 279-80). In fact the injunction may well have saved Mr. McCaslin from investing more money in a losing enterprise. Mr. McCaslin himself testified that "he didn't have any idea" of the volume of business he would have done during the tax season while he was enjoined by the order of the district court. (A. 236-237, 238).

It is plain now and it was plain to the district court that the exact standard of proof for lost profits could not have been satisfied by Mr. McCaslin and this is yet another reason supportive of the decision of the district court not to allow an action for damages on the injunction bond.

CERTIORARI IS INAPPROPRIATE BECAUSE THE UNDERLYING ISSUES OF STATE LAW HAVE HERETOFORE BEEN INCORRECTLY DECIDED IN FAVOR OF PETITIONER.

The validity of covenants against competition in employer/employee contracts under Georgia law requires a three-prong analysis and is to be determined by courts as a matter of law from the face of the contract. The three-part test is well stated in **Coffee System of Atlanta v. Fox,** 226 Ga. 593, 176 S.E.2d 71 (1970):

> An examination of the decided cases on restrictive covenants reveals that this court has customarily considered three separate elements of such contracts in determining whether they are reasonable or not. These three elements, may be characterized as (1) the restraint on the activity of the employee, or former employee, imposed by the contract; (2) the territorial or

> geographic restraints; and (3) the length of time during which the covenant seeks to impose the restraint. It has been said that no better test can be applied to the question of whether a restrictive covenant is reasonable or not than by considering whether the restraint "is such only as to afford a fair protection to the interest of the party in favor of whom it is given, and not so large as to interfere with the interest of the public. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and if oppressive, it is in the eye of the law unreasonable.
>
> There can be no doubt that an agreement that during the term of the service, and for a reasonable time period thereafter, the employee shall not become interested in or engage in a rival business, is reasonable and valid, the contract being otherwise legal and not in general restraint of trade. This is the rule followed by a majority of the American courts and is supported by reason." 226 Ga. 595.

The recent case of **Landmark Financial Services, Inc., v. Tarpley,** 236 Ga. 568, 244 S.E.2d 736 (1976) illustrates how these matters are decided as questions of law by the courts based on a comparison of the restraints in a contract with restraints previously approved by the Georgia appellate courts. In fact the court has recently stated as follows:

> The reasonableness of the restraint is a question of law to be determined by the court. **Edwards v. Howe Richardson Scale Co.,** 237 Ga. 818, 229 S.E.2d 651, 652 (1976).

The only exception would be where the evidence shows that the former employee is being restrained in an area where his former employer did not compete or is being restrained from an activity which

would not be competitively disadvantageous to the employer.[10]

As to the first of the three tests in Georgia--the time length of the restriction--the district court first found (A. 71) as did the Court of Appeals, 541 F.2d at 1099, that five years was permissable in view of the Georgia precedents. In fact, only once in all of the Georgia decisions has a covenant been invalidated because of time. In the case of **Rakestraw v. Lanier,** 104 Ga. 188 (1898) a covenant was invalidated because it contained **no** time restriction at all.

In regard to the second of the three tests--that of the territorial restriction--the Court of Appeals correctly determined that there was no doubt that this aspect of the covenant was valid. 541 F.2d at 1099. There could have been no other conclusion as Mr. McCaslin himself admitted that the Augusta offices of H & R Block compete for and solicit business up to a 25 mile radius from Augusta. (A. 234-36).

The third and last factor to be considered is the reasonableness of the restraint. Petitioner has throughout this litigation attacked the restraint as overly broad, contending that the language is so open-ended that it would prevent petitioner from working in some innocuous and non-competitive position with another company. Petitioner has stressed that the words "in any capacity" must be construed to mean that he cannot work as a janitor, bookkeeper, or truck driver for a competitor. The trial court disagreed with this interpretation and found that all of the activities proscribed in the

[10]*E.g., Dixie Bearings Inc. v. Walker,* 219 Ga. 353, 133 S.E.2d 338 (1963) where the activities restrained included those which would not be anti-competitive, and *Purcell v. Joyner,* 231 Ga. 85, 200 S.E.2d 363 (1973), where the former employee only worked in eight of the seventeen counties where the restriction applied.

covenant--soliciting, accepting, establishing, and engaging in, tax preparation--were activities which could be prohibited. (A. 72). The Court of Appeals acknowledged that this was a difficult question and side-stepped the issue by concluding that the trial judge's findings were not clearly erroneous.[11]

While the covenant in the present case does use the words "in any other capacity", these words do not state that the former employee may not work in any capacity for a competitor. The words as used in this covenant plainly mean that the employee may not, in any capacity, do any one of four things--solicit, accept, establish or engage in the tax preparation business. As found by the trial court, each of these activities has the potential to be anti-competitive in a way which would not be true for a janitor, truck driver, etc.

Petitioner has tried to avoid this interpretation of the covenant by arguing that the prohibition against "engaging" in any business is so broad as to prohibit employment in an innocuous capacity.[12] In any event, his argument must now be laid to rest for certain with the decision on October 26, 1976, in **Edwards v. Howe Richardson Scales Co.,** 237 Ga.

[11]The clearly erroneous standard is one which applies to determinations of fact. H & R Block submits that the interpretation of the terms in the contract was a question of law which should have been set aside if erroneous to any extent.

[12]Most importantly, this Court should not overlook the fact that Mr. McCaslin was not competing as a mere messenger, clerk, or custodian. He was the owner of a chain of four offices which he set up on the very doorsteps of his former employer. His training and experience with H & R Block went into every facet of the tax preparation business and he admitted that he drew upon his ten years with H & R Block in selecting sites, placing his advertisements, hiring his employees and operating every aspect of his business.

818, 229 S.E.2d 651 (1976) where the court sustained a covenant which would not allow a former employee with extensive responsibilities in the former employer's business "to engage" in a competing business.[13]

The district court correctly analyzed all of these issues in its first and most thorough opinion. An about-face became necessary when the case was allowed to go so far as an advisory jury verdict against the employer. While it is not necessary for this Court to try and remedy this error of law by the lower courts, it is important that this Court not set in motion the process of certiorari where the petitioner, as here, was not entitled to the lower court decision on the merits, much less a right of action on the injunction bond.

CONCLUSION

The district court attempted to bring this litigation to an end by lifting the preliminary injunction and at the same time discharging H & R Block from any liability in having obtained the injunction. The court of appeals affirmed this decision. As this Court will determine from its own evaluation of the validity of the restrictive covenants, as well as from the district court's first and most painstaking opinion (A. 67), H & R Block had very sound reasons for attempting to enforce the covenant. The district

[13]The reason that the word "engage" is allowed by the Georgia cases to describe activities that may be lawfully prohibited is that this term means something more than being a messenger boy, janitor, etc. *See, Webster's Seventh New Collegiate Dictionary:* "Engage--to begin and carry on an enterprise."

Edwards, supra, should be compared with *McNease v. National Motor Club,* 238 Ga. 53, 56, 231 S.E.2d 58 (1976) where the court held that it was unreasonable to prohibit an employee from any engagement in a competing business where the employee had only limited responsibilities with the former employer.

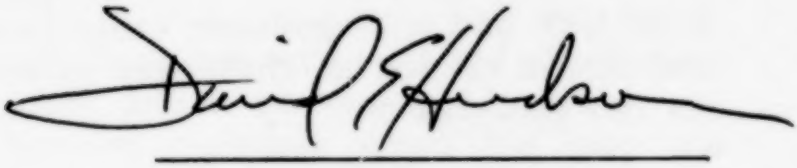
court monitored the entire proceedings and had the opportunity to compare what was presented at the preliminary injunction hearing with what was presented at the trial on the merits. The district court's conclusions that H & R Block proceeded in good faith and with probable cause have not been, and indeed cannot be, challenged as erroneous and for very good reason.

It is submitted that whether this Court continues to follow the rule of **Russell v. Farley,** 105 U.S. 433 (1881), or decides that it will reevaluate the discretion of the district court in the light of the adoption of Rule 65(c), this is an inappropriate case for such an undertaking. For whether this case is reviewed as one involving the district court's discretion or whether the case must turn on the absence or presence of good faith and probable cause on the part of H & R Block, petitioner would not in either event be entitled to relief on the injunction bond.

Finally, it is hard to imagine a factual situation which would demonstrate more graphically than the present record, a former employee attempting to capitalize on what he had obtained from his former employer than does the present case. In locating his offices, hiring his personnel, and in running his business, petitioner appropriated techniques, experience, and confidential information of his former employer. H & R Block attempted to protect itself with a non-compete clause, no part of which has ever been proscribed as inappropriate or unlawful by any decision of the Georgia courts. Moreover, each aspect of the non-compete clause clearly conforms to prior decisions of the Georgia Supreme Court.

For the foregoing reasons, respondent submits that the petition for writ of certiorari should be denied.

Respectfully submitted,



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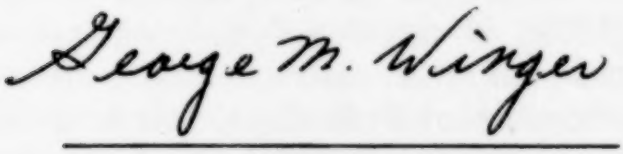


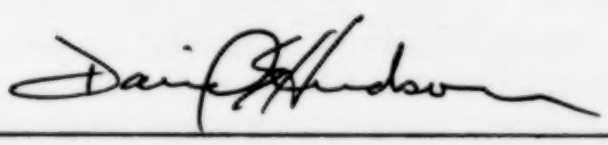
George M. Winger

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing Respondent's Brief in Opposition upon Mr. Jay M. Sawilowsky, 902 Georgia Railroad Bank Building Augusta, Georgia 30902, by placing same in the United States mail properly addressed and posted.

This 3 day of March, 1977.



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